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In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

—v.—

HON. BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. .....

In the

Supreme Court of the United States

October Term, 1968

Harper & Row Publishers, Inc., *et al.*,

Petitioners,

—v.—

Hon. Bernard M. Decker,
United States District Judge, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, defendants in multi-district, multi-party antitrust treble-damage litigation which has been consolidated before respondent for pretrial proceedings pursuant to 28 U.S.C. §1407, petition for a writ of certiorari to review an order of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 9, 1969.

Opinion Below

The Court of Appeals filed no opinion, other than its order of January 9, 1969 (App. A, *infra,* pp. 1a-2a), which is unreported. The relevant orders of respondent, which were issued on July 16, November 27, and December 13, 1968 (App. B, C, D, *infra,* pp. 3a-13a), are also unreported.

Jurisdiction

On January 9, 1969, the Court of Appeals entered its order denying the petition for a writ of mandamus (App. A, *infra,* pp. 1a-2a). On January 18, 1969, Mr. Justice Marshall entered an order staying the production of grand jury and other documents which had been ordered by respondent, "providing a petition for a writ of certiorari . . . is filed in this Court on or before February 10, 1969," in which event the "stay is to remain in effect pending the Court's action on the petition" (App. E, *infra,* p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The issues raised by this petition are of first impression and are of paramount importance to the proper administration of justice under recently-enacted 28 U.S.C. §1407. More specifically, the significant policy issues raised by this petition are:

(1) Whether, in the administration of complex litigation consolidated for pretrial discovery proceedings under 28 U.S.C. §1407, considerations of convenience and expediency can supersede and render nugatory:

> (a) long-established principles of grand jury secrecy, and
>
> (b) the rights guaranteed to litigants under Rule 34 of the Federal Rules of Civil Procedure and under fundamental doctrines of due process of law; and

(2) Whether private treble-damage plaintiffs should be allowed wholesale access, for discovery purposes, to the documents subpoenaed by a grand jury which had investi-

gated possible antitrust violations—even though the grand jury investigation was significantly broader in scope than the claims asserted in the treble-damage actions—solely on the basis of unsupported assertions regarding (a) the relevance and materiality of those grand jury documents, and (b) the expediency and convenience which purportedly would result from their disclosure.

Statute and Rule Involved

The text of 28 U.S.C. §1407, and of Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 34, are printed in Appendix F, *infra,* pp. 15a-19a.

Statement

The petition for mandamus, which the Court of Appeals denied on January 9, 1969, was filed on December 13, 1968 pursuant to 28 U.S.C. §1651. It sought:

> (1) to compel respondent to vacate his improperly issued orders requiring the production of documents, including grand jury documents, and
>
> (2) to compel respondent to conduct discovery proceedings in accordance with the Federal Rules of Civil Procedure, by adhering to established procedures with respect to Rule 34 motions for the production of documents.[1]

[1] Respondent's document production orders were entered in the numerous related private antitrust treble-damage actions (involving library editions of children's books) which have been consolidated before respondent for pretrial purposes pursuant to 28 U.S.C. §1407. Some of the petitioners here are defendants in all of the treble-damage actions to which respondent's document production orders are applicable, but many other petitioners are defendants in only a few (in some cases only two or three) of those treble-damage actions.

Although there was nothing in the record before respondent upon which he could properly predicate a finding of "good cause" or "particularized need," and although there had never been an appropriate hearing with respect to the existence of the requisite "good cause" and "particularized need," respondent nevertheless ordered the defendants in those treble-damage actions to produce certain categories of documents, and also ordered that the plaintiffs in those actions could obtain from the Antitrust Division all of the documents which various grand juries had subpoenaed from any of the defendants during grand jury investigations of the publishing industry.[2]

In order to demonstrate the foregoing, and, more importantly, to demonstrate that respondent's orders were based entirely upon considerations of convenience and expediency, it is necessary to describe fully the circumstances attendant to the entry of those orders, as well as the same treble-damage plaintiffs' prior unsuccessful efforts to obtain access to the same grand jury documents which respondent has now made available to them.

* * * * *

In the course of investigations of the publishing industry which commenced in or about May 1966, one or more federal grand juries subpoenaed documents from various publishers, wholesalers and other persons. Al-

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[2] Ordinarily, parties can assert their rights by refusing to produce disputed documents, thus enabling the issues to be resolved on any contempt proceeding which might be instituted. Cf. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951). Here, however, respondent is permitting plaintiffs to copy the disputed documents *in the government's possession.* Petitioners could not, therefore, refuse to produce and thus could assert their rights only by seeking the extraordinary writ of mandamus from the Court of Appeals.

though no indictments resulted from those grand jury investigations, the subpoenaed documents were retained by the Antitrust Division attorneys who had supervised the investigation, and thus remained under the supervision of Chief Judge Campbell of the Northern District of Illinois (the district in which the grand juries were impaneled).

On April 18, 1967, the Justice Department instituted 18 separate civil actions for injunctive relief, also in the Northern District of Illinois. The complaint in each of those 18 actions named only a single defendant (a publisher of children's books). The gist of each complaint was resale price maintenance, involving the relationship between the single named publisher-defendant and the wholesalers which distributed library editions of that publisher's children's books. Those civil actions were terminated by 18 identical consent decrees, filed on October 23, 1967 and entered by Judge Marovitz on November 27, 1967. Each consent decree expressly stated that it did not constitute an "admission by either party in respect to any issue" raised by the complaint.

The first related private treble-damage action involving library editions of children's books was filed in the Eastern District of Pennsylvania in June 1966. Thereafter, a number of similar (although not identical) treble-damage actions were instituted by states and municipalities in various district courts. The first such action instituted in the Northern District of Illinois was filed on November 1, 1967, and that action was assigned to respondent for all purposes. The complaints in the treble-damage actions are much broader in scope than the complaints in the govern-

ment civil actions, both in terms of the conspiracies alleged and the parties involved.[3]

Commencing on November 2, 1967, several of the treble-damage plaintiffs sought to intervene in the government civil actions for the purpose, *inter alia,* of obtaining copies of all documents which the Antitrust Division had secured during its investigations. At a hearing on November 13, 1967 with respect to their efforts to intervene, counsel for many of the would-be interveners advised Judge Marovitz that:

> "my primary interest is to secure from the government the results of its investigation and I will try the case myself. But, I must have the results of its investigation, the documents it has collected and the statements it has prepared" (Tr., p. 40).[4]

Although Judge Marovitz denied the petition for intervention, on November 20, 1967 he directed that all of the documents in the Antitrust Division's possession should remain in the custody of the Chicago Field Office "until further order of the Chief Judge of the United States District Court for the Northern District of Illinois."

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[3] For example, the complaints in the treble-damage actions allege three different types of conspiracies: horizontal conspiracies among publishers; horizontal conspiracies among wholesalers; and vertical conspiracies among publishers and wholesalers. Moreover, *most* of the companies which are defendants in the treble-damage actions were *not* among the 18 publishers which were defendants in the government civil actions; the treble-damage plaintiffs have asserted claims against at least 9 publishers and 25 wholesalers which were not defendants in the government civil actions.

[4] That attorney for the would-be interveners subsequently became liaison counsel for the treble-damage plaintiffs and briefed this matter on behalf of respondent before the Court of Appeals. He will be referred to hereinafter as "plaintiffs' liaison counsel."

Meanwhile, on November 15, 1967, plaintiffs' liaison counsel filed a petition by which many of the treble-damage plaintiffs sought production of all documents obtained by the Antitrust Division (whether by subpoena or otherwise) during its investigations, as well as copies of the grand jury subpoenas and lists of the grand jury witnesses.[5] That petition was an unprecedented request by private litigants to obtain wholesale access to grand jury proceedings, solely to facilitate and expedite discovery efforts in their civil damage actions. Because that proceeding was not a civil action, and because it did not involve a motion for production of documents under Rule 34 of the Federal Rules of Civil Procedure, the parties thereto did not discuss that Rule or the principles which govern its application in federal civil actions.

On the contrary, the treble-damage plaintiffs did not even attempt to demonstrate that the requested grand jury materials were material or relevant; instead they relied upon the naked, unsupported assertion that *all* of those materials were "material, relevant and essential to prove the price-fixing conspiracies charged in [the] pending treble damage antitrust actions" (Petition to Chief Judge Campbell, p. 9). Moreover, they based their unprecedented request almost entirely upon the unsound premise that considerations of convenience and expediency can override litigants' due process rights and long-established principles of grand jury secrecy.[6]

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[5] That petition was captioned *In Re Grand Jury Proceedings*, No. 66 GJ 3003 (N.D. Ill.), and was directed to Chief Judge Campbell (who is responsible for supervising the grand juries in that District).

[6] For example, the treble-damage plaintiffs asserted:

(1) that disclosure of the requested grand jury materials would "relieve" them "of the onerous and expensive burden"

The publisher-defendants' brief, on the other hand, related primarily to the plaintiffs' failure to satisfy the "particularized need" test which this Court has established as a prerequisite to any invasion of grand jury secrecy. In addition, that brief pointed out that arguments relating to the *desirability* of coordinated discovery should properly be addressed to the Coordinating Committee For Multiple Litigation, rather than to Chief Judge Campbell.[7]

On June 27, 1968, Chief Judge Campbell, in an opinion and order entered on his behalf by Judge Robson, stated that:

(n. 6 cont'd)

of conducting appropriate discovery in their damage actions, in accordance with the Federal Rules of Civil Procedure (Petition to Chief Judge Campbell, p. 9); and

(2) that an order permitting them to conduct their document discovery in the proceeding before Chief Judge Campbell (rather than in the various courts where the treble-damage actions were pending) would achieve "judicial efficiency, economy and uniformity of decision," by avoiding "a multiplicity" of Rule 34 motions for document production (Plaintiffs' Memorandum to Chief Judge Campbell, p. 7).

The phrase "good cause" appeared in the treble-damage plaintiffs' papers only as part of a sweeping conclusory paragraph in the prayer for relief, as follows: "for good cause shown by the facts stated herein, petitioners pray that the Court enter the following orders . . ." (Petition to Chief Judge Campbell, p. 11).

[7] Despite assertions made by the treble-damage plaintiffs in the answer and supporting brief which they submitted to the Court of Appeals (pp. 31-32) (hereinafter referred to as "Answer and Supporting Brief"), petitioners have never, either in their brief to Chief Judge Campbell or at any other time, conceded (or even suggested) that the informal Coordinating Committee For Multiple Litigation had jurisdiction or authority to rule upon, or to enter binding orders with respect to, questions of document production or other discovery motions. In fact, the Coordinating Committee itself never claimed such jurisdiction or authority; it always described its positions with respect to the merits of specific discovery issues as mere "recommendations" or "suggestions" to the various district judges.

> "it has been determined that this petition should be denied because adequate civil procedures are currently available to the parties from which they can secure any discovery of the documents and information mentioned in the petition to which they are entitled" (Opinion and Order, pp. 5-6).

The Chief Judge found that there were "no exceptional circumstances which would warrant the granting of the petition," and stated that he was denying the petition "without prejudice to the contentions of petitioners that they are entitled to the discovery rights and privileges as may be accorded to them under the Federal Rules of Civil Procedure and without prejudice to a renewal of the petition if exceptional circumstances occur in the future" (Opinion and Order, p. 11).[8]

Several months prior to the entry of Chief Judge Campbell's order, the Coordinating Committee, apparently *sua sponte,* commenced efforts to achieve coordinated discovery in the pending private treble-damage actions. In this connection, on or about February 26, 1968, each of the private treble-damage action district judges (including respondent) issued an identical "memorandum order," providing that interested counsel could submit certain suggestions to the court (with a copy to the Coordinating Committee), regarding

> "the desirability and feasibility of: (1) a national program of co-ordinated discovery and pretrial procedures; (2) the creation and maintenance of national document depositories; [and] (3) the development of

[8] Although Chief Judge Campbell's opinion and order referred to the April 19 proceedings before the Coordinating Committee (discussed *infra,* pp. 12-14), it did not comment upon the propriety of those proceedings or upon the soundness of any of the recommendations which the Coordinating Committee had made.

> standard transaction interrogatories and the planning of a 'first wave' of discovery consisting of written interrogatories designed: (a) to disclose the names and location of [potential] witnesses . . ., and (b) to determine the existence, location and custodian of documents, the production of which may be sought on the merits."

On or about March 21, 1968, and before counsel had submitted the requested suggestions, each of the private treble-damage action district judges (including respondent) entered an identical "Order Establishing Schedule For A 'First Wave of Discovery' Including Transaction Information." That order directed that "Upon the recommendation of the Co-Ordinating Committee . . . , and for good cause appearing," the parties should file with the court (with copies to the Coordinating Committee)

> "requests for leave to propound written interrogatories, for orders for production of documents and for leave to schedule depositions upon oral interrogatories for the following purposes: (a) to discover the names and location of witnesses . . . ; (b) to discover the existence, location and custodian of documents . . ., the production of which may be sought on the merits; and (c) to discover information concerning the transactions upon which the claims for relief are based."

Finally, on or about April 1, 1968, each of the private treble-damage action district judges (including respondent) issued a "Memorandum to Counsel," which advised that, "upon recommendation of the Co-Ordinating Committee For Multiple Litigation," the Coordinating Committee would hold a hearing on April 19, 1968 concerning the

matters referred to in the February 26 and March 21 orders.[9]

On April 3, 1968, plaintiffs' liaison counsel filed a memorandum in response to the March 21 order in the actions before respondent. In that memorandum (at pp. 2-3), plaintiffs' liaison counsel made the following significant statement with respect to the purpose of the petitions for wholesale disclosure of grand jury documents and witness lists then pending before Chief Judge Campbell:

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[9] The language of those three orders is virtually identical to that contained in the discussion of the appropriate scope of the "first wave of discovery" in complex multi-district litigation, which appears in the *Manual For Complex and Multi-District Litigation.* That *Manual,* which was prepared by a Subcommittee of the Coordinating Committee and subsequently approved by the Judicial Conference of the United States, provides, in pertinent part:

> "The main objective to be accomplished in the early stages of the recommended program is the completion of a first wave of discovery to be followed in the later phases by a second wave of discovery on the merits. The first wave of discovery should be designed to disclose as far as possible (1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits; and (3) information concerning the transactions upon which the claims for relief are based.
>
> ". . . the judge should initiate the first wave of discovery by establishing a schedule for counsel to submit requests for leave to propound written interrogatories, for leave to schedule depositions upon oral interrogatories, and for orders for production of documents *all to ascertain only the information listed in (1), (2) and (3) above,* . . ." (*Manual,* p. 21) (Emphasis supplied).

It is apparent from the above that the *Manual,* and presumably the Coordinating Committee (which had adopted the *Manual*'s precise language), did not contemplate that the *merits* of document production issues would be decided, or even considered, as part of the "first wave" of discovery in complex multi-district litigation.

> "In the event the petitions are granted, a substantial step forward in the discovery process will have been achieved. Plaintiffs will then be able to *sort out* from the large volume of documents involved *those that are relevant to discovery in their treble damage suits,* and will also be in a position to prepare meaningful and specific motions for the location and production of additional documents." (Emphasis supplied).

Plaintiffs' liaison counsel then recommended "that the Co-Ordinating Committee postpone the issuance of pretrial orders dealing with document production until the aforementioned petitions [to Chief Judge Campbell] have been determined" (*Ibid.*).

Similarly, at the beginning of the Coordinating Committee hearing on April 19, 1968, plaintiffs' liaison counsel acknowledged that plaintiffs had *not* "put forward a Rule 34 motion . . . because we think it is premature. We think that this committee should delay its decisions with respect to what kind of Rule 34 motion is required here until there has been a determination by Chief Judge Campbell" (Tr., pp. 14-15).[10] Subsequently during that hearing, Judge William H. Becker, acting as Chairman of the Coordinating Committee, conceded (in response to a statement by counsel for some of the publisher-defendants) that that hearing *did not* concern the *merits* of document production (Tr., p. 28).

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[10] At the time of the Coordinating Committee hearing, Rule 34 motions had been filed in only two of the several courts in which the damage actions were pending—the Northern District of California and the Eastern District of Pennsylvania. Defendants had no occasion to submit briefs in opposition to those motions, however, and, prior to the Coordinating Committee hearing, orders staying all discovery were entered by both of the courts in which those motions had been filed.

Nevertheless, Judge Becker thereafter engaged one of the counsel for the publisher-defendants (some of the petitioners here) in a brief colloquy pertaining to production of grand jury documents (Tr., pp. 47-51). That colloquy, however, did not include a presentation of any facts upon which either the Coordinating Committee or respondent could properly base a finding that there was "good cause" and "particularized need" which would warrant production of all documents subpoenaed by the grand juries. In fact, at no time during that hearing did counsel for any of the treble-damage plaintiffs even attempt to demonstrate that such "good cause" and "particularized need" existed.

At the conclusion of the hearing, however, Judge Becker announced that the Coordinating Committee would "recommend . . . that the judges [in each district where any of the treble-damage actions was pending] consider making a finding of good cause, which is necessary under Rule 34 for the production" of "the Grand Jury documents in the Government's case which led to the Government's case in Chicago" (Tr., pp. 80-81).

Because the Coordinating Committee recognized that it had no jurisdiction or authority to enter binding discovery orders in any of the pending treble-damage actions, Judge Becker spoke only in terms of *"recommendations"* and *"suggestions"*; he did not indicate that there had been a ruling or a finding that "good cause" had actually been established. In fact, Judge Becker carefully prefaced his remarks with a reference to the fact that he was merely presenting an "informal statement of the recommendations which will be made by the coordinating committee to the judges in which these cases are pending," and he also stated that:

> "suggestions that are made here are simply recommendations, which will be made to the judges for their use in the cases pending before them. Each judge before whom a case is pending, or before whom cases are pending has the power and is encouraged to dispose of the matters pending before him as he deems proper and just under the law, and the rules of civil procedure" (Tr., p. 78).

At the end of the proceedings on April 19, Judge Becker requested that counsel for the parties submit proposed forms of orders reflecting the Committee's oral recommendations. Accordingly, during the ensuing several weeks, counsel for the various parties submitted proposed forms of orders to the Coordinating Committee.[11]

On June 27, 1968, Judge Templar of the Kansas District Court, acting *sua sponte,* entered National Pretrial Order No. 1 exactly as promulgated by the Coordinating Committee. Judge Templar entered the Order without any hearing or any prior notice to counsel (none of whom had previously seen that Order), "pursuant to the [Coordinating Committee's] rulings of April 19, 1968." Paragraph 7 of that Order stated that, "for good cause appearing," defendants were required to produce various categories

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[11] In complying with Judge Becker's request, petitioners' counsel made it clear that they were not waiving their rights with respect to the propriety of any order regarding the production of documents, particularly because no hearing had been held with respect to such an order, and because the treble-damage plaintiffs had not even attempted to establish the existence of "good cause" or "particularized need." Moreover, because of Judge Becker's statement that the Coordinating Committee was merely making "recommendations" and "suggestions" to the various district judges before whom the treble-damage actions were pending, petitioners' counsel anticipated that each of those judges would hold a hearing at which the parties would have an opportunity to show cause why the Coordinating Committee's "recommendations" should be modified or rejected.

of documents, including all documents which had been subpoenaed from them during the grand jury investigations of the publishing industry, as well as the grand jury subpoenas themselves.

On the following day, the Coordinating Committee sent copies of National Pretrial Order No. 1 to all of the treble-damage action district judges (except Judge Templar). The Committee's transmittal letter stated that Judge Templar had already entered that Order, and that the Order "embodies the *rulings* made at the hearing in Kansas City" (Emphasis supplied). The Committee's transmittal letter also "recommended" to each of the district judges:

> "that a pretrial conference be held promptly in the case or cases pending before you at which the enclosed National Pretrial Order No. 1 *will be entered*" (Emphasis supplied).

On Thursday afternoon, July 11, respondent held a brief pretrial conference with respect to proposed National Pretrial Order No. 1. At the beginning of that pretrial conference, respondent's clerk distributed copies of the proposed Order to counsel, many of whom (including plaintiffs' liaison counsel) had not previously seen it and were not aware of its contents. Plaintiffs' liaison counsel then presented several suggestions for expanding the scope of the proposed Order, but defendants' counsel spoke very briefly, and did not argue (or even have an opportunity to argue) the merits of any aspect of the proposed Order. Instead, defendants' counsel suggested that entry of National Pretrial Order No. 1 be deferred, so that if the various treble-damage actions were consolidated before a single judge for pretrial purposes (pursuant to recently-

enacted 28 U.S.C. §1407), all issues regarding discovery could be presented to, and decided by, that judge.[12] Nevertheless, respondent directed the parties to submit their comments on that entire proposed Order by the following day (Friday, July 12), and indicated that he intended to enter that Order on July 16, 1968.

Accordingly, counsel for some of the petitioners who were represented at the pretrial conference submitted their general comments on the proposed Order in a July 12 letter to respondent. In that letter, counsel again asserted that, although the proposed document production involved "serious constitutional and procedural questions," the defendants had never had an opportunity "to brief and adequately argue the question whether the proposed order should require them, wholesale, and without a showing of either relevance or good cause, to produce the grand jury documents for inspection by plaintiffs." Accordingly, counsel again suggested that respondent defer entry of the proposed Order, so that, "if a Section 1407 judge is designated on the recommendation of the Judicial Panel, the question of grand jury documents need be argued only once rather than before eight different district judges."[13]

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[12] 28 U.S.C. §1407 had become effective some time after the April 19 hearing before the Coordinating Committee. Several motions for transfer and consolidation of these treble-damage actions had been submitted to the Judicial Panel appointed pursuant to that statute sometime *before* the Coordinating Committee promulgated its proposed National Pretrial Order No. 1.

[13] Despite the treble-damage plaintiffs' criticism of petitioners' position in this respect (Answer and Supporting Brief, pp. 22-23), that position is entirely consistent with the §1407 Judicial Panel's own statements with respect to the purpose of the new statute:

> "The purpose of Section 1407 as shown independently by its clear language, corroborated by the legislative history, including the reports of the Congressional Committee and of the

Nevertheless, on July 16, 1968, respondent entered National Pretrial Order No. 1 exactly as it had been promulgated by the Coordinating Committee (except for six minor technical changes which had also been approved by the Coordinating Committee) (App. B, *infra*, pp. 3a-8a). That is, respondent ordered the defendants to produce grand jury and other documents, "for good cause appearing," even though at that time:

> (1) no Rule 34 motion had been filed in any of the actions pending before respondent;
>
> (2) none of the plaintiffs in those actions had even attempted to establish the existence of "good cause" and "particularized need" justifying the document production which respondent ordered; and
>
> (3) none of the defendants in those actions had ever had a meaningful opportunity to demonstrate that the requisite "good cause" and "particularized need" did not exist.[14]

On October 17, 1968, all of the then pending treble-damage actions were transferred to respondent for con-

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(n. 13 cont'd)
Judicial Conference, and by testimony before Congress of its authors, makes it clear that its remedial aim is to eliminate the potential for conflicting contemporaneou pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions. The contentions of the City in this case, if sustained, would make possible, and perhaps probable, pretrial chaos in conflicting class action determinations which Section 1407 was designed to make impossible" (Opinion of Judge William Becker in *In Re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures,* 1968 CCH Trade Cas. ¶72,671, at p. 86,381 (footnote omitted)).

[14] Many of the petitioners here were not even represented at the July 11 pretrial conference before respondent, because they were not then parties to any action pending before respondent.

solidated pretrial proceedings, in accordance with 28 U.S.C. §1407. The §1407 Judicial Panel's opinion did not discuss the production of documents or any other aspect of discovery in the pending treble-damage actions, but merely noted that the grand jury documents had been impounded in Chicago, and that many of the plaintiffs in the pending treble-damage actions had "applied to the district court for release of" those documents (*In Re Multidistrict Private Civil Treble Damage Litigation Involving Library Editions of Children's Books,* 1968 CCH Trade Reg. Rep. ¶50,217 (Judicial Panel, Oct. 17, 1968)).

On November 1, 1968, respondent indicated that he intended to hold a pretrial conference for the purpose of discussing procedural matters, and he directed the parties to file suggested agendas listing the matters which they believed should be discussed. On November 22, some of the petitioners submitted a proposed agenda, item 5 of which read *in toto* as follows: "Presentation of Motion Requesting a Hearing With Respect to Exhibit E to National Pretrial Order No. 1." On November 27, 1968, however, respondent, in a letter to all counsel, stated that petitioners' request for a hearing with respect to document production would *not* be considered at the forthcoming pretrial conference, because:

> "National Pretrial Order No. 1 decided authoritatively that the documents requested by Exhibit E should be produced" (App. C, *infra,* pp. 9a-11a).

Thereafter, on December 6, petitioners moved respondent to stay all document production pending a hearing concerning plaintiffs' failure to show "good cause" or "particularized need." However, during the presentation

of that motion (by which petitioners merely sought a *hearing* on the merits of the document production), respondent advised petitioners' counsel:

> "I don't think that you are going to be spending your time profitably trying to convince me that there isn't good cause . . ." (Tr., p. 34).

On December 13, respondent denied petitioners' motion for a stay pending a hearing on the document production issue, and also denied their further motion for a stay of the document production pending the filing of a petition for a writ of mandamus in the Court of Appeals (App. D, *infra,* pp. 12a-13a).

On that same day, petitioners filed a petition for a writ of mandamus, accompanied by a motion requesting that the Court of Appeals stay the proposed document production pending a ruling on the mandamus petition (which motion the Court promptly granted). Thereafter, petitioners filed an amended petition for a writ of mandamus on December 20, and a supporting brief on December 23. In those documents, petitioners pointed out that respondent had no proper basis for finding "good cause" or "particularized need" justifying the document production which he ordered; that there had never been an appropriate hearing with respect to that document production; and that respondent's document production orders were *inherently* improper for the following reasons, *inter alia:*

> 1. Those orders authorize, *inter alia,* wholesale disclosure of "each document produced [by the treble-damage defendants] in response to a grand jury subpoena . . . in the course of investigations of the publishing industry," despite the fact that the various

treble-damage actions involve only one aspect of the publishing industry, i.e., library editions of children's books.

2. Those orders do not apply only to companies which were defendants in the treble-damage actions at the time of the Coordinating Committee hearing on April 19, or to companies which were defendants in the treble-damage actions pending before respondent on July 16 (when he entered National Pretrial Order No. 1). On the contrary, the orders apply *automatically to every defendant,* no matter when it first became a party to the treble-damage actions which have been consolidated before respondent pursuant to 28 U.S.C. §1407.

3. Those orders grant every plaintiff access to the documents of *every* company which is a defendant in *any action,* whether or not a particular plaintiff has ever instituted an action, or asserted a claim, against the particular company whose documents it seeks.

On December 26, the Court of Appeals, apparently concluding that petitioners had presented at least a *prima facie* case for mandamus, ordered the filing of an answer "with supporting brief" on or before January 6, 1969. Plaintiffs' liaison counsel filed that Answer and Supporting Brief (which was a single composite document) on January 6.

On January 7, 1969, before counsel for many of the petitioners had even seen that Answer and Supporting Brief, Chicago counsel for several petitioners moved the Court of Appeals for leave to file a reply brief responding to the treble-damage plaintiffs' (1) "significant misleading statements of facts, including erroneous characterizations and descriptions of orders and proceedings in certain trial courts, as well as before the Coordinating Committee For

Multiple Litigation and the present Statutory Section 1407 Panel," and (2) "erroneous constructions of many cases, which are not readily apparent from a reading of the cited portions of those cases."

Nevertheless, on the following day, the Court of Appeals peremptorily denied petitioners' request for leave to file a reply brief, thus precluding petitioners from pointing out the numerous flagrantly misleading and inaccurate statements in the Answer and Supporting Brief (only a few of which are discussed in this petition), and preventing the Court of Appeals from obtaining a complete and accurate description of the facts and the law which might affect its decision.

On January 9, petitioners requested the Court of Appeals to permit oral argument, because the issues involved were "vitally important policy issues which no appellate court has heretofore considered." However, the Court of Appeals, without hearing oral argument (and perhaps even before receiving petitioners' motion for leave to present oral argument), denied the petition for mandamus, stating simply that respondent's order "did not constitute a usurpation of power, *Will* v. *United States*, 389 U.S. 90, 95, and that petitioners have not shown a clear right to the extraordinary writ of mandamus" (App. A, *infra*, pp. 1a-2a).

Reasons for Granting the Writ

Review of the Court of Appeals' decision is clearly warranted, because this case presents exceedingly important issues of first impression concerning the proper administration of justice in multi-party, multi-district litigation

which has been consolidated for pretrial purposes under recently-enacted 28 U.S.C. §1407.

The narrow issue presented by this petition is whether undue emphasis upon considerations of convenience and expediency has deprived petitioners of their rights under the Federal Rules of Civil Procedure and under fundamental principles of due process. The broader issue presented, however, is whether the courts, when administering justice in complex litigation which has been consolidated for pretrial purposes under 28 U.S.C. §1407, can properly ignore traditional procedural safeguards merely to facilitate more convenient and more expedient conduct of the litigation. In enacting 28 U.S.C. §1407, Congress manifestly did not intend to discriminate against litigants involved in complex multi-district litigation, by depriving them of fundamental procedural rights which are guaranteed to litigants in less complex actions. Accordingly, it is essential for this Court to enunciate supervisory guidelines which will insure that the administration of justice under 28 U.S.C. §1407 does not emphasize too much concern for administration, and too little concern for justice to the parties involved.[15]

I.

Manifestly, there is no factual basis in the record upon which respondent could properly predicate a finding that there was "good cause" or "particularized need" for the document production which he ordered. That respondent's actions were based entirely on considerations of convenience and expediency, without regard to petitioners' funda-

[15] The applicable legal principles are discussed in Part II, *infra*, pp. 27-34.

mental due process rights or traditional doctrines of grand jury secrecy, is apparent from a brief summary of the remarkable series of events which preceded respondent's unprecedented document production orders:

1. The grand juries which investigated the publishing industry did not return any indictments, and the complaints in the treble-damage actions (which relate to only one aspect of the publishing industry) are much broader in scope than the complaints in the government civil actions (see *supra,* pp. 4-6).

2. Chief Judge Campbell *denied* the treble-damage plaintiffs' petitions for wholesale disclosure of grand jury documents. Those petitions plainly did not involve or constitute Rule 34 motions for the production of documents, and at no time during the proceedings with respect to those petitions did the treble-damage plaintiffs even attempt to establish "good cause" and "particularized need" for the requested document production (see *supra,* pp. 7-9).

3. Plaintiffs' liaison counsel expressly stated, in a memorandum submitted to respondent, that the treble-damage plaintiffs were seeking to obtain *all* of the documents which the grand juries had subpoenaed, so that they could "sort out from the large volume of documents involved those that are relevant to discovery in their treble damage suits" (see *supra,* pp. 11-12).

4. The Coordinating Committee's hearing to consider a so-called "first wave of discovery" was *not* intended to, and did not, encompass consideration of the merits of document production. Plaintiffs' liaison counsel asserted (both prior to and during the course of that hearing) that it would be "premature" for the Coordinating Committee to consider Rule 34 motions at that time, and the acting Chairman of the Coordinating Committee conceded that the hearing did not concern

the merits of document production (see *supra,* pp. 12-13).

5. Despite the treble-damage plaintiffs' failure to make any affirmative presentation during that hearing with respect to document production, the Coordinating Committee "suggested" and "recommended" that each of the various district judges before whom the treble-damage actions were pending (including respondent) "consider making a finding of good cause, which is necessary under Rule 34 for the production" of "the Grand Jury documents in the Government's case which led to the Government's case in Chicago" (see *supra,* pp. 13-14).

6. Despite the absence of any Rule 34 motion before respondent, any hearing before respondent on the merits of document production, or any factual presentation before respondent with respect to the propriety of any document production, respondent nevertheless found that there was "good cause" for the production of the grand jury and other documents, and he denied petitioners' repeated requests for a hearing with respect to that issue. It is apparent that respondent simply adopted the Coordinating Committee's "recommendations" unquestioningly, without giving adequate consideration to, or permitting the parties to present their views regarding, the propriety of those recommendations and their applicability to the actions pending before him. Moreover, respondent ignored, or was not aware of, the fact that the Coordinating Committee made those "recommendations" *without any factual basis therefor and without an appropriate hearing on the merits of document production* (see *supra,* pp. 15-17).

The impropriety of respondent's orders is highlighted even by the arguments which the treble-damage plaintiffs

presented to the Court of Appeals. For example, in their Answer and Supporting Brief (pp. 39-41), they listed five factors which purportedly demonstrated the existence of "good cause." An analysis of those five factors, however, demonstrates graphically that respondent's orders must have been based solely on considerations of convenience and expediency, because there is nothing else in the record upon which respondent could possibly have predicated a "finding" that "good cause" existed. Thus,

1. The entry of consent decrees in government civil actions has no bearing on treble-damage plaintiffs' *need for, or right to,* documentary production in their own private actions. This is particularly obvious in the instant situation, because the complaints in the treble-damage actions are far broader in scope than the complaints in the government civil actions, and because *most* of the defendants in the treble-damage actions were not parties to the government civil actions or to the consent decrees in those actions (see *supra,* pp. 5-6).

2. The fact that the Antitrust Division had possession of the documents which were subpoenaed by grand juries investigating the publishing industry likewise has no bearing on the existence of "good cause." The Antitrust Division always collects subpoenaed documents during the course of grand jury investigations, but the mere convenience provided by that "assembly of documents" surely does not warrant wholesale disclosure of those grand jury documents to treble-damage claimants for discovery purposes. Moreover, the treble-damage plaintiffs' naked, unsupported assertion that the assembled grand jury documents are "relevant, material and essential" to the prosecution of their actions manifestly does not constitute a sufficient shewing of "good cause." The mere fact

that certain documents were subpoenaed by grand juries investigating the entire publishing industry does not make those documents *ipso facto* relevant or material to treble-damage actions which involve only one facet of that industry.

3. Moreover, the fact that "a multitude of treble damage actions" has been instituted, or that numerous parties are involved, surely does not justify entry of document production orders in utter disregard of Rule 34's expressly stated "good cause" requirement, particularly in view of this Court's recognition that the "good cause" requirement is "not a mere formality, but is a plainly expressed limitation on the use of that Rule." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 118 (1964) (discussed *infra*, pp. 28-29). Nor is there any basis for the treble-damage plaintiffs' unsupported assertion that the private actions are "in large part based upon the federal investigation and complaints" (see *supra*, pp. 5-6). Even if that were true, however, there is no logical reason why that would justify wholesale disclosure of grand jury documents to private litigants for discovery purposes.

4. Nor are the treble-damage plaintiffs somehow exempted from the "good cause" requirement of Rule 34 simply because they are public bodies. It is beyond dispute that the Federal Rules of Civil Procedure apply with equal force to *all* litigants, including even the United States.

5. Finally, the existence of a "strong public policy to aid treble damage claimants" surely does not render the "good cause" requirement inapplicable to private treble-damage actions, nor does it confer upon private treble-damage claimants any special right to invade the traditionally secret files of grand juries for discovery purposes.

The treble-damage plaintiffs' assertion that those five clearly irrelevant factors establish "good cause" demonstrates beyond question that respondent's orders were not based upon the existence of any "special circumstances [which] make it essential to the preparation of the moving party's case that the desired information be made available to him." *Williams* v. *Continental Oil Co.*, 215 F. 2d 4, 7 (10th Cir. 1954) (discussed *infra*, p. 29). *A fortiori*, the treble-damage plaintiffs have failed to establish the "particularized need" which would warrant granting them access to traditionally secret grand jury proceedings.

Thus, it is abundantly clear, even from the arguments which the treble-damage plaintiffs themselves have advanced, that respondent's document production orders resulted from an improper reliance upon considerations of convenience and expediency, in utter disregard of petitioners' rights and of the principles which govern discovery in federal civil actions (discussed *infra*, pp. 28-31).

II.

The Court of Appeals' order denying the petition for a writ of mandamus[16] (App. A, *infra*, pp. 1a-2a) is at odds with this Court's decisions that mandamus should be invoked in cases where lower courts have displayed a persistent disregard of the Federal Rules of Civil Procedure. For example, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) and in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957), this Court held that such conduct constituted a "clear abuse of discretion" and "usurpation of judicial power" which warranted the issuance of writs of mandamus.

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[16] As indicated *supra* (p. 4, n. 2), mandamus was the only remedy by which petitioners could protect their rights.

Under the facts and circumstances detailed above, issuance of the requested writ clearly is justified because respondent has completely disregarded the procedural rules and the precedents which govern discovery proceedings in federal civil actions. Respondent issued those document production orders:

(1) without any Rule 34 motion pending before him;

(2) without any attempt by plaintiffs in the treble-damage actions to demonstrate that there was "good cause" or "particularized need" for the document production ordered;

(3) without any proper basis upon which to predicate a finding that the treble-damage plaintiffs had established the "good cause" or "particularized need" required by Rule 34 and by applicable legal precedents;

(4) without any justification for violating the veil of secrecy which traditionally protects grand jury proceedings; and

(5) without an appropriate hearing regarding the existence of "good cause" and "particularized need," thus clearly depriving petitioners' of their fundamental due process rights.

Rule 34 authorizes production of documents *only* "upon motion of any party showing good cause therefor and upon notice to all other parties, . . . " (App. F, *infra,* p. 15a). The "good cause" requirement of Rule 34 has been applied quite stringently over the years, because the courts have recognized that a litigant should not be permitted access to an opposing party's documents without substantial justification. In fact, as this Court noted in *Schlagenhauf* v. *Holder,* 379 U.S. 104, 117-118 (1964), the stringent "good cause" requirement does not apply

generally to *all* categories of discovery under the Federal Rules of Civil Procedure; on the contrary, "good cause" is a prerequisite to discovery *only* under Rule 34 (which relates to production of documents) and Rule 35 (which relates to physical and mental examinations of parties). In the *Schlagenhauf* case, this Court pointed out that the law is well-settled that the "good cause" requirement of Rule 34 "is not a mere formality, but is a plainly expressed limitation on the use of that Rule" (*Ibid*).

That is, the "good cause" requirement cannot be satisfied by a mere showing that the requested materials are relevant. On the contrary, "in each case the question is whether special circumstances make it essential to the preparation of the moving party's case that the desired information be made available to him." *Williams* v. *Continental Oil Co.*, 215 F. 2d 4, 7 (10th Cir. 1954). To the same effect, see *Guilford National Bank* v. *Southern R. Co.*, 297 F. 2d 921, 924-925 (4th Cir. 1962); *Hauger* v. *Chicago R. I. & Pac. R.R.*, 216 F. 2d 501 (7th Cir. 1954); *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (D.C. Cir. 1948); *Alltmont* v. *United States*, 177 F. 2d 971 (3rd Cir. 1950).

Accordingly, Rule 34 motions for production of documents will not be granted "merely to serve the convenience of counsel, or as reassurance that counsel has overlooked nothing, or on a mere hope that the documents sought may be useful to the moving party" (2A Barron and Holtzoff, *Federal Practice and Procedure*, pp. 426-428 (Wright ed. 1961)). Instead, the movant must demonstrate that there are some "special circumstances" which make it essential that an opposing party's private documents be disclosed. And, as Judge Wortendyke said in denying a Rule 34 motion for production of all documents which the govern-

ment had obtained "through seizure or process in the course of the Federal Grand Jury investigation," Rule 34 "does not contemplate that a party may obtain a permit to explore the documents in the possession of his adversary in the hope that he may find something that may adversely affect the adversary's case, or that may prove helpful to the case of the movant." *United States* v. *Becton, Dickinson and Co.*, 30 F.R.D. 132, 134 (D. N.J. 1962).

Moreover, this Court repeatedly has insisted that the "indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity," and, therefore, that a litigant seeking to pierce the traditional veil of grand jury secrecy must satisfy an *even more stringent* test by demonstrating "particularized need" —i.e., something more than the mere "relevancy and usefulness" of the information sought. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-683 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). In addition, the courts consistently have held that wholesale disclosure of grand jury proceedings for purposes of civil discovery is inconsistent with the traditional functions of the grand jury, and that discovery is not a purpose which properly warrants disclosure of grand jury proceedings. See, e.g., *In Re April 1956 Term Grand Jury*, 239 F. 2d 263, 271-272 (7th Cir. 1956) (documents subpoenaed by a grand jury could not properly be utilized by agents of the U.S. Treasury Department in connection with civil proceedings); *In Re Holovachka*, 317 F. 2d 834, 836-838 (7th Cir. 1963) (the Indiana Attorney General and the Disciplinary Commission of the Indiana Supreme Court could not obtain grand jury minutes for use in a pending disbarment proceeding, because "the convenience of

discovery . . . has never been regarded as sufficient cause to lift the secrecy of grand jury proceedings"); *Continental Baking Co.* v. *United States,* 281 F. 2d 137, 148 (6th Cir. 1960); *Application of State of California,* 195 F. Supp. 37, 39-41 (E.D. Pa. 1961) (treble-damage plaintiffs denied access to grand jury materials, including grand jury subpoenas and witness lists); *United States* v. *Stein,* 18 F.R.D. 17, 19-20 (S.D.N.Y. 1955) (denying motion for pretrial production of "all . . . documents and papers presented to the Grand Jury," because "Secrecy of Grand Jury proceedings may not be violated either directly through inspection of the Grand Jury minutes, . . . or indirectly by disclosure of the documentary evidence presented to it"). See also *Maryland & Virginia Milk Producers Association, Inc.* v. *United States,* 250 F. 2d 425 (D.C. Cir. 1957) (because all documents subpoenaed by a grand jury are not necessarily relevant to a subsequent related government civil action, government counsel in such a civil action are permitted to use *only* those of the grand jury documents which they could properly have obtained through a Rule 34 motion, by making an appropriate showing of "good cause").

The treble-damage plaintiffs' Answer and Supporting Brief in the Court of Appeals cites no contrary legal precedents or authority which would support respondent's order. In fact, petitioners are completely in accord with the principle relied on most heavily in that Answer and Supporting Brief—namely, that traditional concepts of grand jury secrecy do not apply when documents are sought "for their intrinsic value," rather than to learn what occurred before a grand jury (Answer and Supporting Brief, p. 51). That principle has no bearing on this proceeding, however, be-

cause the treble-damage plaintiffs here manifestly are *not* seeking documents "for their intrinsic value." On the contrary, they are seeking discovery of all documents which the grand juries subpoenaed, *precisely because those documents were subpoenaed by the grand juries.* This fact has been admitted by plaintiffs' liaison counsel, who stated that his "primary interest is to secure from the government . . . the results of its investigations, . . . the documents it has collected, and the statements it has prepared," and also that "a substantial step forward in the discovery process will have been achieved [if] plaintiffs [are] . . . able to sort out from the large volume of documents [obtained by the Antitrust Division] those that are relevant to discovery in their treble damage suits" (*supra,* pp. 6, 12).

Moreover, none of the cases cited by the treble-damage plaintiffs justifies the wholesale disclosure of grand jury documents which respondent has ordered. For example, in *United States* v. *Interstate Dress Carriers, Inc.,* 280 F. 2d 52 (2nd Cir. 1960) (Answer and Supporting Brief, pp. 52-53), the ICC's desire to inspect certain records which a grand jury had subpoenaed from Interstate had *nothing* whatsoever to do with the fact that those records had been subpoenaed by a grand jury. On the contrary, as Chief Judge Lumbard's opinion pointed out, the ICC sought the documents for use in its own "lawfully authorized," and entirely unrelated, investigation; the documents merely "happened to be in the control of the grand jury" at the time when the ICC requested them. The Court of Appeals expressly stated that, although "documents as well as oral testimony may come within [the] proscription against disclosure" of grand jury proceedings, the ICC (unlike the treble-damage plaintiffs here) had clearly demon-

strated its "independent legal authority for the inspection" of the documents, which authority was entirely unrelated to the grand jury's interest in those documents.

In Re Hearings before the Committee on Banking and Currency of the United States Senate, 19 F.R.D. 410 (N.D. Ill. 1956) (Answer and Supporting Brief, pp. 54-55), presented a similar factual situation. There, a Senate committee had requested access to a *specific ledger* which merely happened to be in the possession of the grand jury at the time of the request, and the Senate committee had *independent legal authority* for its inspection of that ledger. Accordingly, Judge Sullivan's decision granting the committee's request was simply a holding that the mere presence of the ledger in the hands of the grand jury did not preclude the Senate committee (1) from obtaining a copy of that ledger from the individual who owned it (or from his representative), or (2) from inspecting the original of the ledger, which was still in the possession of the grand jury.

By contrast, the treble-damage plaintiffs here are seeking production of the grand jury documents *solely because the grand juries subpoenaed those documents.* Respondent's orders require the production of "each document produced [by treble-damage defendants] in response to a grand jury subpoena . . . in the course of investigations of the publishing industry." The treble damage plaintiffs, however, have made no effort (1) to identify those documents in any other manner, (2) to demonstrate how many of those documents are "relevant, material and essential" to any of the pending treble-damage actions, or (3) to show that they

have "independent legal authority for the inspection" of those documents.[17]

Finally, the treble-damage plaintiffs have attempted to convey the false impression that the unprecedented type of document production which respondent has ordered in fact is an ordinary, commonplace and frequently granted form of discovery. Nothing could be further from the truth, however, despite plaintiffs' assertions that such wholesale disclosure of grand jury documents "has become standard procedure in treble damage cases involving public agencies," and that "in many recent multiple antitrust proceedings . . . district courts—without discussion or opinion—have directed the production of documents previously submitted to the Government as a result of grand jury subpoenas" (Answer and Supporting Brief, p. 56). Although the treble-damage plaintiffs cited seven unreported cases in support of those assertions, none of those cases even remotely resembles the instant proceeding. In each instance the parties whose documents were being sought *did not object, or withdrew their objections,* to producing the documents sought. It is, therefore, not at all surprising that the various courts entered those orders "without discussion or opinion."[18]

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[17] *In the Matter of Grand Jury Proceedings (General Dynamics Corp.)* 1961 CCH Trade Cas. ¶70,027 (S.D.N.Y. 1961), also relied on by the treble-damage plaintiffs in this connection (Answer and Supporting Brief, pp. 55-56), is clearly inapposite. That case involved *defendants in a pending criminal contempt action* who were seeking access to the grand jury documents which government counsel were using in connection with the prosecution of that action.

[18] The seven cases cited by the treble-damage plaintiffs are: (1) *State of Illinois* v. *Pennsalt Chemical, et al.* (N.D. Calif., No. 46550); (2) *Illinois Public Service Co.* v. *Aluminum Co. of Amer-*

In short, none of the authorities cited in the Answer and Supporting Brief justify respondent's document production orders in view of the treble-damage plaintiffs' failure to demonstrate either "good cause" or "particularized need," as required by this Court's decisions.

CONCLUSION

This petition presents extremely significant questions of first impression with respect to the proper administration of justice in complex multi-district litigation consolidated for pretrial proceedings under recently-enacted 28 U.S.C. §1407. Because this Court's guidance is necessary to insure the protection of litigants' rights in these circumstances, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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